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No. 669

SUPREME COURT OF THE UNITED STATES

CHARLES L. THOMAS, ET AL., Appellants,

versus

BROADWAY BAPTIST CHURCH, a Corporation, Appellee.

PETITION FOR CERTIORARI.

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WESTERFIELD-BONTE CO., INCORPORATED LOUISVILLE, KY.

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Supreme Court of the United States

CHARLES L. THOMAS and his wife, JEWELL E. THOMAS; JOHN H. WELCH and his wife, MARTHA C. WELCH; J. W. JONES and his wife, CLARE V. JONES; FRANK J. PADWICK and his wife, TAIMI J. PADWICK; MILTON F. JEFFERSON and his wife, LYSADEAN W. JEFFERSON; DAVIS M. HOWERTON, JR. and his wife, MARTHA FLOYD HOWERTON; SCOVILLE W. DUNCAN and his wife, ALTA MAE DUNCAN; SHERMAN H. MEYER and his wife, JACKLYN M. MEYER; FRIEDRICH WOLFGANG FINGER, JR. and his wife, DOROTHY O'NEIL FINGER; HARRY G. DAVIS and his wife, MARY G. DAVIS; DAVID M. LONGENECKER and his wife, RACHEL ANNE LONGENECKER, and WILLIAM P. SHUSTER and his wife, LUCILE B. SHUSTER, - - - - *Appellants,*

v.

BROADWAY BAPTIST CHURCH, a corporation, *Appellee.*

PETITION FOR CERTIORARI.

At their petition for the allowance of a writ of certiorari the appellants respectfully state:

1. (a) The opinion of the trial court in this case appears in the Transcript of Record, pages 35 to 51. Two opinions were delivered in the case by the Court of Appeals of Kentucky. The original opinion of that Court appears in the Transcript at pages 134 to 136.

The modified and final opinion appears in the Transcript at pages 153 to 155. The final opinion is reported in 316 S. W. 2d 698, as City of Druid Hills, *et al.* v. Broadway Baptist Church.

(b) (i) The judgment of the Kentucky Court of Appeals affirmed the judgment of the trial court. The judgment of the appellate court is dated May 2, 1958. It appears at page 133 of the Transcript. Appellants filed their Petition for Rehearing with the appellate court June 2, 1958, which appears in the Transcript at pages 138 to 149.

(ii) The original opinion of the appellate court was modified and the Petition for Rehearing overruled October 31, 1958.

(iii) 28 USC 1257 (3) gives this Court jurisdiction to review by writ of certiorari final judgments rendered by the highest court of a state "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution" of the United States. In this case appellants claim a right under the Fourteenth Amendment to the Federal Constitution.

(c) The questions presented for review are: (1) whether the judgment amounts to an appropriation of a public street to private control by appellee and deprives appellants of their property without due process of law, contrary to the Fourteenth Amendment, and (2) whether the judgment is so flagrantly contrary to law as to be arbitrary and capricious and deprives appellants of their property without due process of law, contrary to the Fourteenth Amendment.

(d) The following Kentucky statutes are involved in this case, and may be found in the official edition of the Kentucky Revised Statutes under the following numbers:

88.080. The board of trustees of the city may pass ordinances not in conflict with the Constitution or laws of this state or of the United States. It may do and perform any and all acts and things necessary or proper to carry out the provisions of the laws relating to cities of the sixth class, and may exact and enforce within the city limits all local, police, sanitary, and other regulations not in conflict with general laws.

94.292 (3). Subject to the provisions of KRS 94.291 to 94.325, the city legislative body shall have full power to determine what public improvements shall be made, the extent and character of the improvement, the kind of material to be used, and the necessity for the improvement, and its determination shall be final.

94.297 (1). Except as provided in 94.298 and 94.299, the city legislative body, in the original ordinance providing for the making of any public improvement, shall provide that the improvement be made at the exclusive cost of the owners of the benefited property, as defined in KRS 94.301, or shall have the alternative or providing that the city shall pay a specified part of the cost and the owners of benefited property shall pay the balance.

94.301. In the case of street improvements, the benefited property shall consist of all real estate abutting upon both sides of the portion of the street to be improved, * * *

> 94.670: The city legislative body in cities of the sixth class may cause to be removed any obstructions in the streets of the city. It shall cause to be opened any public way dedicated to the town that is closed, but before doing so shall give to the adjacent property owners one month's notice thereof.

(c) The appellee, Broadway Baptist Church, is a corporation, which owns 7.22 acres of land on which is located church buildings. The land fronts 728 feet on the south side of U. S. Highway 42. The land was acquired by appellee in 1948. The church buildings were erected soon thereafter. The entire property has been used for church purposes since July 2, 1950, with Highway 42 being used for ingress and egress.

The western boundary line of the church property extends from U. S. 42 southward 575.73 feet. Immediately west of the western line of the church property is a residential subdivision known as Brownsboro Village (see plat, page 14 of Transcript). This subdivision was fully developed before appellee acquired the aforesaid tract of land. Within the subdivision is a dead-end street, or court, known as Olympic Avenue. The court is about 300 feet south of and parallel to Highway 42. The court is a strip dedicated as a public way, 75 feet wide and extending from Chenoweth Lane eastward 600 feet to the western line of the church property. The paved portion of the court is nineteen feet wide and extends from Chenoweth Lane eastward to a point six feet from the church property. There are thirteen homes on the court. Heretofore the court

has been used principally by the residents thereon and such members of the public who had occasion to use it as a short dead-end street. The court has been improved and maintained at the sole expense of the resident property owners thereon.

In 1948 the appellee sought permission from the County Zoning Commission to use its land for church, playground, and recreational purposes, and to use Olympic Avenue as a means of ingress and egress to and from the church property. The then residents of Olympic Avenue objected to the opening of the court and its conversion into a street to serve as a means of access to the church premises. That controversy reached the courts. The local circuit court, common pleas branch, rendered a judgment in favor of appellee. On appeal to the Court of Appeals an opinion was delivered June 10, 1949, reversing the lower court but not deciding the issues, which opinion is reported as Hill, *et al.* v. Kesselring, *et al.*, 220 S. W. 2d 858. Following that decision, on July 21, 1949, the trial court entered an injunctive judgment which, among other things, reserved for future determination the right of the church and its congregation to use Olympic Avenue, and provided "* * * and the Broadway Baptist Church and its congregation shall make no use of Olympic Avenue pending the final determination of this action." The appellee did not further pursue that action, the last step being an order remanding the case in August, 1950.

The city of Druid Hills was incorporated as a sixth class town in 1949. The legislative body of the town is

a Board of Trustees. The town embraces the church property and Olympic Avenue.

Appellee made no effort to obtain an opening or extension of Olympic Avenue for church traffic from August, 1950, until November 19, 1955, when appellee's attorney wrote a letter to the Board of Trustees of Druid Hills, requesting the Board to require the removal of the various objects in the six foot strip between the end of the paved portion of Olympic Avenue and the church property, which objects consisted of trees, shrubbery and guard posts, which appellee claimed were obstructions within the street. The Trustees declined to remove the objects or to approve their removal. Thereupon this suit was filed March 3, 1956, by appellee against the City of Druid Hills, its Trustees and the owners of the thirteen lots abutting on Olympic Avenue, asking the court to enjoin the Trustees from continuing to refuse to remove said objects, or from refusing to permit appellee to remove them and to pave the portion of the Avenue now occupied by the objects, and to enjoin the defendants from interfering with such action by the appellee and from interfering "with the use of said Avenue by persons seeking ingress or egress to or from" appellee's property. There was no demand that appellee be adjudged the right to use the Avenue as access to its own property.

The appellants answered appellee's complaint and pleaded, among other things, (1) that the complaint did not state a claim upon which relief could be granted; (2) that the injunctive judgment in the Hill case was still effective and was a bar to appellee's

claim; (3) that appellee had negligently failed to assert its claim from July 2, 1949, to November 19, 1955, during which time appellee had used its property without making any use of Olympic Avenue, and had acquiesced in the use and maintenance of the Avenue, as a dead-end street, and during which time the defendant owners of two homes on the street, in 1952, made improvements to their homes at a total cost of $16,393.00 with knowledge that appellee had asserted no claim to the use of the court since 1949 which led them to believe that appellee had abandoned its alleged claim, and that the appellee was thus guilty of laches, and that if appellee's demand be granted it would deprive them of their property without due process of law, contrary to the Federal Constitution; (4) that during said time, in 1952, 1953, 1954, 1955, 1956, the defendant owners of seven homes on the court had purchased their homes with knowledge that appellee was regularly using its premises without making any use of Olympic Avenue, and that they would not have purchased their homes if they had known that appellee was claiming any right to open the easterly end of Olympic Avenue to church traffic, and that to permit appellee now to so open the Avenue would deprive them of their property without due process of law, contrary to the Federal Constitution; (5) that no part of appellee's property abuts or fronts on Olympic Avenue, and no part of appellee's property is a part of the subdivision known as Brownsboro Village, and the dedication of said Avenue as a public way was not for the benefit of the owner of appellee's property or any person having a special

right to use appellee's property, and (6) that the alleged obstructions are not obstructions on or across said Avenue, but consist of trees over twenty years old, and shrubbery planted March 17, 1948, and four guard posts erected August 5, 1949, to protect the trees and shrubbery from damage by motor vehicles turning at the closed end of the Avenue; that said trees, shrubbery and guard posts are within the area between the end of the paved street and appellee's property, a zone extending a distance of six feet, and that said trees, shrubbery and posts do not interfere with or obstruct the public use of the Avenue.

The claim of the appellants, pleaded in their answer, that a part of the relief sought by appellee would deprive appellants of their property without due process of law, contrary to the Federal Constitution, was passed on by the court of first instance by stating in his written opinion that " 'due process of law,' by virtue of KRS 94.670, requires cities of the sixth class to keep open all dedicated public ways" (Transcript, page 43). And further, on page 49 of the Transcript:

> Defendants' claim that plaintiff's proposed use of Olympic Avenue will constitute an unconstitutional taking of their property is without merit. It does appear somewhat inequitable that defendants, as property owners abutting the sides of Olympic Avenue, as presently constituted, must bear the entire expense of building and maintaining the paved portion of the street and see it used and perhaps damaged by others without recompense. Yet that same possible inequity applies to

all publicly-dedicated streets. The property owners who pay the cost do not enjoy the exclusive rights to the use of the streets.

The appellate court did not pass on the federal questions. The federal question of the appellants being deprived of their property without due process of law was specifically presented to the appellate court in appellants' petition for rehearing as appears on pages 140 and 145 of the Transcript.

The City of Druid Hills and its officials have not joined in this petition because the City, not owning any of the property involved, cannot claim that it has been deprived of its property. Appellants claim their property will be damaged $56,000.00.

(f) Appellants wish to amplify the reasons relied on for the allowance of the writ by the following argument:

Said KRS 94.292 (3) vests the city legislative body with the sole and final authority to determine the necessity of paving and extending Olympic Avenue to appellee's property. The legislative body has exercised its discretion and decided against such an extension of the street. Appellee makes no claim of fraud, collusion, or bad faith by the Trustees. The state courts have overriden such authority and function of the legislative body and transferred the authority to appellee. Such action by the state courts will result in appellants, as abutting property owners on each side of the street and liable for its maintenance, being deprived of their property, not by appellee using the street but by mem-

bers of the public who desire to use it in going to and from appellee's property. The members of the public who desire to use the street should be limited to using it as it now is, and as the Trustees, for obviously sound reasons for the public interest, have said it should be used by the public. The injunction against the Trustees is permanent. They will no longer be authorized to exercise any control over a portion of a public street. Appellee will control and determine the necessity and nature of the improvement and the manner of its use by the public. This special control and use permitted by the state courts will place an extra financial burden on appellants, and it will be an added servitude on their property. Appellants contend that due process under the Fourteenth Amendment requires that they not be deprived of their property in that respect. This presents a federal question of substance not heretofore determined by this Court. The Trustees have a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances. New Orleans Public Service v. New Orleans, 281 U. S. 82, 74 L. Ed. 1115.

The decision of the appellate court is arbitrary and flagrantly contrary to law for the following reasons:

1. The decision fails to give effect to the provision of KRS 94.292 (3) that the Trustees have the power to determine the necessity to improve and extend Olympic Avenue, and its determination "shall be final".

2. The alleged obstructions do not constitute obstructions in the street, and do not operate to close the street within the meaning of KRS 94.670, because those

objects do not interfere with the use of the street by the public. It would be just as reasonable to say that the street is closed because it is not paved the full width of the easement and because there are trees and shrubbery within the easement and on each side of the present pavement.

3. The court ruled that appellee was not guilty of laches after a delay of more than five years in asserting its alleged right. This was contrary to the court's earlier ruling in the case of Stratton & Terstegge Co. v. Meriweather, 150 S. W. 381, wherein the court ruled: "But it has been frequently declared that, when the works (obstructions) complained of had been allowed to stand three years before suit, it was such laches as would prevent relief in equity." The same court ruled in the case of Home Laundry Co. v. City of Louisville, 182 S. W. 645, that the right of an abutting property owner to use a street for ingress and egress is a private right which may be lost or abandoned.

4. The decision permits appellee to remove the trees and shrubbery without compensation to the abutting property owners, although the evidence shows that money was expended for their purchase and planting.

5. The appellate court disregarded the injunction granted in the Hill case. That injunction has never been modified or set aside.

The denial of due process to appellants is to be tested by an appraisal of the totality of facts in the case. Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595.

The due process exacted from states is a conception of fundamental justice. Foster v. Illinois, 332 U. S. 134, 91 L. Ed. 1955.

The action of state courts is regarded as action of the state within the meaning of the Fourteenth Amendment. Shelly v. Kraemer, 334 U. S. 1, 92 L. Ed. 1161.

Wherefore, the appellants petition this Court to issue its writ of certiorari for review of the appellate court judgment, and that this Court reverse the ruling of the state appellate court.

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OPINION OF THE JEFFERSON CIRCUIT COURT.

June 25, 1956.

On the 18th of June, 1937, the Olympic Realty Company executed a dedication by which it dedicated "to public use" the street now known as Olympic Avenue. The right-of-way for the street, which is 75 feet, more or less in width, extends from Chenoweth Lane, to which the dedication also added 15 feet in width, in an Eastwardly direction to property on the East abutting or adjoining the subdivision then being laid out. Thus, according to the dedication, the Eastwardly dead-end of Olympic Avenue coincides with the property line of the tract of land to the East. This tract to the East has been acquired by the Broadway Baptist Church.

It appears that the paved portion of the road has occupied only a small part of the center of the right-of-way and also that it has not extended any closer to the present West line of the Broadway Baptist Church than six feet. Thus, there have always been areas of the right-of-way lying between the front yards of the Olympic Avenue lot-owners and the paved portion of the road not used by the traveling public. Also, the six-foot buffer zone at the dead-end of Olympic Avenue has never been used by the traveling public.

After an unsuccessful attempt to get the Fiscal Court of Jefferson County to improve the road as a part of the County road system, the lot-owners executed an instrument attempting to withdraw the dedication of Olympic Avenue as a public road. At their own expense, the lot-owners improved the street and caused a sign reading "Private Road" to be placed at the intersection of Chenoweth Lane. The question has not been pressed before me but I might comment, that, under authority of *City of*

Middlesboro v. *Kentucky Utilities Co.*, 23[illegible] 523, the attempted withdrawal of dedication was ineffective.

The plaintiff desired to erect a Church and other buildings, and to develop recreational facilities on the acreage tract to the West of the dead-end of Olympic Avenue. It applied to the Louisville & Jefferson County Planning & Zoning Commission for a "Special Use" permit authorizing such uses of this property. A number of property owners, including some of the parties hereto, while not objecting to the Church itself, did present certain other objections to the Planning & Zoning Commission, among which was the assertion that Olympic Avenue was a private road; that the Church intended to use it as a way of ingress and egress; that parking facilities provided in the Church's plan of improvement were inadequate; that there was, therefore, a threat that their road would be used for parking purposes and a traffic hazard created.

The Planning & Zoning Commission granted the "Special Use" permit; it was appealed to the Circuit Court which affirmed the order of the Commission and thence it was appealed to the Court of Appeals of Kentucky. In *Hill* v. *Kesselring*, 310 Ky. 483, the Court of Appeals affirmed the lower Court insofar as approval of erection of Church buildings was concerned but reversed for a further hearing on question relative to traffic hazards and recreational facilities, and on the question of whether Olympic Avenue was a public or private road.

No re-trial was ever had in the lower Court. Before the matter came on for trial, the City of Druid Hills was incorporated as a city of the sixth class. Under *Fortner* v. *Louisville & Jefferson County Planning & Zoning Commission*, Ky., 243 S. W. 2d 492, the area of the Broadway Baptist Church came into the City of Druid Hills as unzoned property.

A judgment was entered in the Circuit Court under date of July 21, 1949, authorizing the building of the Church itself but reserving other questions. It was specifically provided that the judgment should in no way be considered "as an indication of the right of the Church or its congregation to use Olympic Avenue, that question being expressly reserved; and this order is without prejudice to any right of the Church or its congregation to use Olympic Avenue or the right of the plaintiffs to prevent the use of Olympic Avenue by the Church or its congregation, that question being expressly reserved for future determination; and the Broadway Baptist Church and its congregation shall make no use of Olympic Avenue pending the final decision of this action".

After the incorporation of the City of Druid Hills, a motion to dismiss the above named action as moot was made but apparently never acted upon. Among other things, it is claimed by defendants herein that, since the Church was enjoined from using Olympic Avenue pending final decision of the earlier Circuit Court action, the question raised by this case has already been decided. Reliance is had on res judicata.

A casual reading of the above quoted portion of the earlier judgment convinces the reader that the question of the right to use Olympic Avenue was definitely kept open. It is true that the language contemplated a "final decision of this (that) action". The main purpose of that action became moot upon the incorporation of the sixth class city. The question of the right to use Olympic Avenue did not become moot. Therefore, since the question was specifically reserved, it strikes me that the plea of res judicata must fail.

The present action seeks a declaration of the rights of the parties and consequential relief in that Court is asked to enjoin the Board of Trustees of the sixth class city from

refusing to permit plaintiff to remove the obstructions in the six-foot buffer zone and to pave that buffer zone so that plaintiff may use Olympic Avenue as a means of ingress and egress. Consequential relief is also sought against the individual defendants as well as the City of Druid Hills, seeking to enjoin them from interfering with the removal of said obstructions and the use of Olympic Avenue by persons seeking ingress or egress to or from plaintiff's property.

In addition to the plea of res judicata, defendants also rely on Laches. It is also asserted that to permit plaintiff to use Olympic Avenue would amount to the taking of defendants' property without due process. It is claimed that plaintiff's property does not abut on Olympic Avenue so as to give plaintiff any rights in the Avenue. It is asserted that the buffer zone of six feet was never accepted by the public. Finally, it is claimed that the original dedication of Olympic Avenue was as a private road as distinguished from a public road.

As I read the *Hill* v. *Kesselring* case, three distinct rulings were handed down in that opinion:

First, it affirmed the trial court insofar as the erection of Church buildings had been authorized by the Planning & Zoning Commission. This phase of the case is no longer of interest.

Second, it directed the trial court to conduct a hearing on the question of whether the Planning & Zoning Commission had abused its discretion in determining issues relative to traffic hazards, off-street parking and recreational facilities contra to the contentions of objecting land-owners. If the trial court should find at a later hearing that there was an abuse of discretion in this respect, then it was directed to remand the case to the Planning & Zoning Commission on this score. This phase of the case has become

moot because of the incorporation of the City of Druid Hills.

Third, the Court of Appeals held that the trial court was in error in not determining whether Olympic Avenue was a public or a private road. Because of the objectors' contention that Olympic Avenue was private and not public, the Court said:

> "While collateral to the question of whether the action of the Planning & Zoning Commission should be affirmed or disapproved, the right of the public to use the street is a prime factor which must enter into the decision. If it should be determined that it is a private way or court, restricted to serving only the appellants' property located on it, then the plan approved by the commission would seem to afford only limited access to the area set aside and platted for off-street parking of automobiles. If the avenue can be opened up as a public thoroughfare, the questions of traffic hazards and possible parking on the street will be presented. We think the Court should have required Jefferson County to be made a party, since it seems to be concerned, and have decided the question."

* * * * * * * *

I think it significant that the Court of Appeals did not state that the issue to be determined at a later hearing was whether the Church property abutted on Olympic Avenue or whether the Church had a right to use Olympic Avenue. Rather, the opinion seems to imply that the Church had a right to use Olympic Avenue if there was a public dedication as distinguished from a private dedication of it. Apparently, the Court did not have before it the established fact which I have before me that, in dedicating Olympic Avenue, the developer of the subdivision specifically used language dedicating to public use.

Since *Hill* v. *Kesselring* is the law of the case, and since the opinion seemed to define the issue as being one of

whether Olympic Avenue is a public or a private way, and, since I am compelled, from the unambiguous language of the dedication to decide that it is a public way, to some extent at least, it could be argued that *Hill* v. *Kesselring* has already resolved the issue pending before me.

Defendants urge that, even though the dedication on its face was to public use, as a practical matter it was intended that the dedication be for the benefit of only the lot-owners abutting on the sides of the right-of-way. They go on to assert that the dedication, at least insofar as the six-foot buffer zone is concerned, has never been accepted by the City of Druid Hills or the public, citing *Wilson* v. *Pioneer Coal Co.*, 191 Ky. 408, 231 S. W. 37. The *Wilson* case involved a road that had been dedicated by prescription and also involved the question of whether or not the same road had been vacated. There was an obiter dictum statement to the effect that "an acceptance by the public is necessary" to constitute a road a public highway. Where, however, as is the case here, a subdivision is laid out and streets are shown on the plat of dedication, even though those streets are not actually opened and even though they are not actually accepted by the city, they are still considered public dedications. In *Morrow* v. *Richardson*, 278 Ky. 233, it is said of this type of dedication:

> "This amounted to an immediate dedication of such streets to the use of the purchasers of the lots *and of the public, although the streets were not actually open and there had been no acceptance by the city.* Acceptance is material where it is sought to hold the city liable for failure to maintain the streets in reasonable repair, but this is not that kind of case." (Emphasis supplied.)
>
> . . . . . .

See also *Volpenheim* v. *Westerfield*, 216 Ky. 157.

My finding, therefore, is that the whole of Olympic Avenue, including the six-foot buffer zone, is a public way. Since its incorporation in the limits of the City of Druid Hills, it is also a city street of that town.

One of the contentions most strenuously urged by defendants is that the Board of Trustees of the defendant city has full power and control over its city streets. The plaintiff in this action submitted an ordinance to the Board of Trustees with the request that this ordinance be adopted by the Board, the effect of which would have been to have the city itself remove the obstructions from the six-foot buffer zone. The Board of Trustees unanimously refused to adopt said ordinance and instructed its chairman to inform plaintiff that the city would take no action so to do. Defendants proceed to urge the court that the Board of Trustees has full power and right to close a road or a part of a road; that this action on the part of the Board of Trustees is the equivalent thereof and, therefore, because of this control over its streets by the Board, plaintiff's action must fail.

An examination of the applicable statutes discloses that a city of the sixth class has entirely different powers over its streets from those of any other class.

There is a special statutory proceeding for the discontinuance by county governments of county roads. KRS 93.360 provides for the discontinuance of city streets by cities of the first class. KRS 94.360 provides for the vacation of city streets by second, third, and fourth class cities. Both of these statutory proceedings require all owners of ground in the squares, or lots divided by the street, to be made parties to the action.

No similar statute applies to either a city of the fifth or the sixth class. The Court of Appeals held in *Commonwealth* v. *Ill. Central Railroad Co.*, 138 Ky. 749, 129 S. W. 96, that a fifth class city under the broad powers granted it by KRS 87.070 had the right to enact an ordinance clos-

ing a street, particularly in view of the fact that the ordinance in no wise deprived individuals of their right to recover damages which they might sustain by reason of the closing.

Defendants urge that, since KRS 88.080 grants to cities of the sixth class broad powers similar to those granted fifth class cities by KRS 87.070, this same rule should apply to Boards of Trustees of sixth class cities. The reason this contention fails is the mandatory provision of KRS 94.670. This statute is made applicable alone to cities of the sixth class and requires such cities mandatorily to "cause to be opened any public way dedicated to the town that is closed . . .".

The rule is "once a public road, always a public road", *Brown* v. *Roberts*, 246 Ky. 316, 56 S. W. 2d 9, *Wilson* v. *Pioneer Coal Co.*, 191 Ky. 408, 231 S. W. 37, unless such public road is vacated in "due course of law". It strikes me that "due course of law", by virtue of KRS 94.670, requires cities of the sixth class to keep open all dedicated public ways. The same power to close or vacate public ways granted to other cities is apparently withheld from cities of the sixth class.

In reaching this conclusion, I have considered the fact that the Legislature, in granting power to legislative bodies of the first four classes of cities to discontinue their city streets, carefully required that all "owners of ground in the square . . ." be made parties to the litigation accomplishing the closing. If any of such owners should object to the closing, the closing could be accomplished only after full payment of damages to all such owners.

Defendants vigorously insist that plaintiff is not such an owner of property abutting Olympic Avenue as to give it a right to maintain an action enforcing a private right as distinguished from a public right to the use of Olympic Avenue. When Olympic Avenue was dedicated to the

public, the lots on either side thereof were sold by lot number and, therefore, the description of the purchasers' property did not read "to the center line of the road". Nevertheless, it seems to me that the lot-owners own title to the center of the road, subject, however, to the right of the public to use the road for the purposes dedicated, *Williams v. Johnson*, 149 Ky. 409, 149 S. W. 821. Also, the owners of the lots have an easement appurtenant to their lots granting them the use of Olympic Avenue. This is a private right which was not at any time granted to plaintiff or its predecessors in title.

Plaintiff's right in Olympic Avenue stems from the dedication to the public. It enjoys the same right to use Olympic Avenue as members of the public generally. It is true, therefore, that its right is a public one as distinguished from a purely private right. Where a plaintiff seeks to maintain this sort of action, relying on violation of a right of the general public as distinguished from an action based upon an appurtenant easement, the plaintiff must show a special injury differing in kind and degree from that suffered by other members of the general public.

In determining whether such special damage is suffered, the fact that the plaintiff is an "adjoining or adjacent landowner" is considered, *Jamison v. L. & N. R. R. Co. and City of Beattyville*, 176 Ky. 654. The opinion in the case of *Henderson v. City of Lexington*, 132 Ky. 390, uses similar language, "those whose property abuts upon or adjoins the street" when concluding which persons have a special, as distinct from a general, injury from the closing of a public way. There property owners owning property around the corner from Main Street in Lexington, whose property did not abut on the alley sought to be closed, were denied special damages because "the closing of the alley did not, except indirectly, interfere with the right of ingress or egress to and from their property".

Davis v. *Paducah*, 213 Ky. 407 and *Alsip* v. *Hodge*, 214 Ky. 438, are authority for the proposition that abutting property owners within the same block as the portion of the street sought to be closed are those suffering special injury differing from the injury suffered by the general public.

Counsel for defendants has cited numerous cases from foreign jurisdictions to the effect that property owners abutting dead-ends of streets or alleys are not considered in those states as abutting property owners with any distinct private right or private injury when the closing of such streets or alleys is involved. It strikes me, however, that the Court of Appeals of Kentucky has met this question head-on in *Morrow* v. *Richardson*, 278 Ky. 233, 128 S. W. 2d 560. There, a set of facts similar, at least in some degree, to those here under consideration, was before the Court of Appeals. There the plaintiff sought ingress and egress across an unimproved portion of a publicly dedicated street, against the end of which only five feet of plaintiff's property abutted. Defendant there had erected a fence at the dead-end of the street. The Court of Appeals had the following to say:

> "The fact that the right of ingress to and of egress from this Richardson lot abutting on Short was interfered with by Miss Morrow's fence inflicted a special damage upon the appellees which was not suffered by the general public. By closing Short Street with this fence, the appellees, who owned this lot abutting thereon, would be compelled to take a circuitous route to reach Highway 80, one of the main thoroughfares in Pulaski County, rather than by reaching it by traveling 145 feet on Short Street. This fence was a public nuisance which did a special damage, giving to the appellees the right to maintain this suit. Alsip v. Hodge, 214 Ky. 438, 283 S. W. 392; Davis v. City of Paducah, 213 Ky. 407, 281 S. W. 158; Husband v. Cotton, 171 Ky. 177, 188 S. W. 380, L.R.A. 1719 A, 1150;

York v. C. & O. Ry. Co., 240 Ky. 114, 41 S. W. 2d 668; Cranley v. Boyd County, et al., 266 Ky. 569, 99 S. W. 2d 737."

. . . . . .

Defendants' contention that KRS 94.297 and KRS 94.302, enacted in 1950, and providing that the cost of improvements of public streets in a sixth class city shall be assessed against only property owners abutting its sides according to the number of front feet, had the effect of overruling *Morrow* v. *Richardson*, is not well-taken. KRS 94.290, since repealed, enacted in 1938, before *Morrow* v. *Richardson*, also provided for a similar type of assessment for improvements. See also KRS 94.580, also since repealed. The case of *Volpenheim* v. *Westerfield, supra*, is definite authority for the rule that, where a person within the block of a dedicated street, although not the owner of an appurtenant easement, nevertheless enjoys the right to the use of the public street, and even though it is a public right, he may enforce such right in the Courts.

I feel bound by the *Morrow* v. *Richardson* and the *Volpenheim* cases. I have examined with interest the foreign authorities cited by defendants. Some of the cases turned on the question of whether the dead-end abutting property owners had a special injury as distinct from the injury suffered by the public generally. This particular question seems definitely settled in Kentucky so long as the complaining property owner is within the same block.

Kingshighway Supply Co. v. *Banner Iron Works*, 266 Mo. 138, 181 S. W. 30 was decided on the charter power of the city, the Court commenting that the Legislature had constituted the city the sole judge of the opening or closing of city streets. As discussed above this is not the case in Kentucky.

In *Kirby Terminal Co.* v. *City of Detroit*, 63 N. W. 2d 601, the Michigan Court held that property owners outside

of a sub-division had no rights in a dead-end alley. The Court apparently recognized that a different rule might apply to streets as distinguished from alleys. The Michigan Court had no statute similar to our KRS 94.670 to consider. It also apparently made the yardstick of whether special injury was suffered that of whether or not contesting property owners were in the same subdivision rather than the yardstick our Court has adopted as to whether or not they are in the same block.

Phillips Mercantile Co. v. *City of Alburquerque*, 287 P. 2d 77, also had to do with an alley as distinguished from a street and recognized the fact that a different result might have been reached had there been a statutory requirement in New Mexico, requiring notice to all abutting plaintiffs, citing as authority for that distinction *Messinger* v. *City of Cincinnati*, 173 N. E. 260.

It therefore appears to me that the cases from foreign jurisdictions are not so in conflict, as at first blush they appear to be, with our rules laid down in Volpenheim and *Morrow* v. *Richardson*.

This opinion is already too extended but, because of the earnestness of the counsel for the defendants in his arguments, I believe his contentions should be discussed fully.

The third and fourth defenses pleaded in the answer rely upon Laches because the earlier Circuit Court action was permitted to lie dormant from August 11, 1950, to November 19, 1955. By the judgment entered in that earlier action, plaintiff in effect was enjoined from using Olympic Avenue until its rights could be adjudicated.

During the interim, defendants contend that certain lot-owners on Olympic Avenue, relying upon the hope that it would always be a dead-end street have made extensive improvements to their homes, and other persons, relying upon the same hope, have purchased property on Olympic Avenue.

I can understand the desire for parents of small chil[illegible] to reside on a dead-end street. Nevertheless, the dedication of Olympic Avenue is a matter of public record and I think the defense of Laches is denied parties (even if these facts would otherwise constitute Laches) where information that Olympic Avenue was a publicly-dedicated street has been fully available to the defendants. In the very recent case of *Stephens* v. *Click*, Ky., 287 S. W. 2d 630, the Court of Appeals commented on this type of matter as follows:

> "We do not understand how it would be doing equity to deprive plaintiffs of their interest in the oil and gas under their land even though they may not have acted as soon as they should, or may not have been as vigorous as they should in protecting their property, when this record shows defendants could have received full information by proper and careful examination of the deed books in the county court clerk's office."

* * * * * * * *

Defendants' claim that plaintiff's proposed use of Olympic Avenue will constitute an unconstitutional taking of their property is without merit. It does appear somewhat inequitable that defendants, as property owners abutting the sides of Olympic Avenue, as presently constituted, must bear the entire expenses of building and maintaining the paved portion of the street and see it used and perhaps damaged by others without recompense. Yet that same possible inequity applies to all publicly-dedicated streets. The property owners who pay the cost do not enjoy the exclusive rights to the use of the streets.

In this respect, a further comment might be made on the six foot buffer zone. If the Kentucky rule, that the dead-end abutting owner can enforce his rights in the public-dedicated street, were not followed, a tendancy might exist for all subdivision developers to establish buffer zones at

the ends of streets. Then, as the community grows and subdivisions are created beyond the ends of the streets, the entire community would be developed in a hodge-podge of dead-end streets. At a time when flow of traffic is of such utmost importance, I am confident that the Planning & Zoning Commission would reject that type of development.

In its complaint, plaintiff demanded, among other things, that the Court enjoin the Board of Trustees from continuing to refuse to remove the obstructions in Olympic Avenue. In reverse, this would require me mandatorily to order the Board of Trustees to take affirmative action to accomplish the removal. Even though I may have the power to order the removal, I doubt that I could direct the manner or method by which a legislative body should accomplish such removal nor the manner in which the body should provide the funds by which the removal could be accomplished. In his brief, counsel for plaintiff saves me from this determination. He states that the only relief sought is a "restrictive injunction" and apparently is not insisting upon a mandatory injunction.

Therefore, judgment is authorized and may be submitted by counsel declaring the rights of the parties to be that Olympic Avenue is a publicly-dedicated way and the plaintiff and persons seeking ingress and egress to plaintiff's property have the right to use Olympic Avenue. As consequential relief, the defendants will be enjoined from refusing to permit plaintiff to remove the obstructions in the six-foot buffer zone and authorizing plaintiff to pave the said six-foot buffer zone, and further enjoining all the defendants from obstructing or attempting to obstruct said Avenue in the future, or interfering or attempting to interfere with the use of said Avenue by persons seeking ingress or egress to or from plaintiff's property.

(s) Stuart E. Lampe,
Judge.

JUDGMENT OF THE JEFFERSON CIRCUIT COURT.

This cause coming on to be heard on the motions of both plaintiff and defendants for judgment and upon statement of counsel that all proof was completed and the action ready for submission in chief, and the Court having heard arguments of counsel and being advised, and having filed its written opinion herein,

It Is Considered, Ordered And Adjudged:

1. That the opinion filed herein be adopted as the findings of fact and conclusions of law of the Court.

2. That the whole of Olympic Avenue, including the six-foot buffer zone, is a public way and a city street of the city of Druid Hills.

3. That the plaintiff and persons seeking ingress and egress to and from plaintiff's property have the right to use Olympic Avenue.

4. That the defendants, and each of them, their agents and employees, be, and they are hereby permanently enjoined and restrained from refusing to permit plaintiff, its agents or employees, to remove all the obstructions in the six-foot buffer zone between the end of the paved portion of Olympic Avenue and the plaintiff's property line, or any other obstruction within the limits of the publicly dedicated street where it approaches or joins the property line of the plaintiff which might interfere with the traveled portion of the road, which, if constructed by the Church, shall be the same width through the buffer zone as the present width of the traveled portion of Olympic Avenue.

5. That the defendants, and each of them, their agents and employees, be and they are hereby permanently enjoined and restrained from interfering, or attempting to interfere, with the paving of the said six-foot zone, or from

obstructing or attempting to obstruct said street in the future, or from interfering or attempting to interfere with the use of said street by persons seeking ingress or egress to or from plaintiff's property.

6. That the plaintiff recover its costs herein expended, for which it may have execution.

7. Defendants, pursuant to C.R. 65.12, having moved the Court to suspend the injunction herein pending appeal, IT IS ORDERED that said injunction be, and it will be suspended upon the filing of a bond with good and sufficient surety in the penal sum of One Thousand ($1,000.00) Dollars, conditioned to pay all costs and damages which plaintiff may suffer if said appeal is not prosecuted promptly and with effect, such bond to be filed herein within ten (10) days, otherwise this suspension shall be of no effect.

(s) Stuart E. Lampe,
Judge.

June 28, 1956.

ORIGINAL OPINION OF THE KENTUCKY COURT OF APPEALS.

The Broadway Baptist Church, a Corporation, filed this action against the City of Druid Hills and other parties to enjoin them from interfering with the removal of guard rails and other obstructions placed upon Olympic Avenue which prevent traffic from using the street for ingress to and egress from plaintiff's property located at the dead-end of the street. The complaint also asked that the Church be permitted to pave the six-foot portion of Olympic Avenue lying between plaintiff's property and the paved portion of the street. The Chancellor entered a judgment granting the relief sought by the plaintiff, and the defendants have appealed.

Druid Hills is a city of the sixth class. It is conceded that Olympic Avenue is a public street, dedicated to the city by a recorded instrument for that purpose, and that it extends from Chenoweth Avenue eastwardly to the line of the church property. The avenue is wholly within the territorial limits of Druid Hills.

Appellants urge that the city has the exclusive right to determine whether it will keep Olympic Avenue open t traffic and that it also can decide the extent and character of the improvements it will permit to be made on its streets. To support its contentions, the appellants rely principally upon the provisions of two statutes: First, KRS 88.080 which provides:

> "The board of trustees of the city may . . . do and perform any and all acts and things necessary or proper to carry out the provisions of the laws relating to cities of the sixth class, and may enact and enforce within the city limits all local, police, sanitary and other regulations not in conflict with general laws."

And secondly, KRS 94.292(3) which provides:

> "* * *, the city legislative body shall have full power to determine what public improvements shall be made, the extent and character of the improvement, the kind of material to be used, and the necessity for the improvement, and its determination shall be final. * * *."

While it is apparent that those statutes confer upon the governing authorities of cities of the sixth class the power to reasonably regulate the use of their streets, yet such cities are required by the mandatory provisions of KRS 94.670 to keep open all public ways dedicated to the city. This statute provides:

> "The city legislative body in cities of the sixth class may cause to be removed any obstructions in the streets of the city. It shall cause to be opened any public way dedicated to the town that is closed, but before doing so shall give to the adjacent property owners one month's notice thereof."

The power to close or vacate dedicated public ways granted to cities of the first five classes was withheld from cities of the sixth class. Consequently, the Chancellor correctly determined that it was the duty of the governing body of Druid Hills to open Olympic Avenue and to make it available for public use in conformity with the purpose for which it was dedicated. Morrow v. Richardson, 278 Ky. 233, 128 S. W. 2d 560; Volpenheim v. Westerfield, 216 Ky. 157, 287 S. W. 545. Since the city could have been compelled to remove the obstructions on Olympic Avenue that prevented the free use of the travelled portion of the street (KRS 94.670), we have concluded that the Chancellor did not abuse his discretion by issuing a restrictive injunction prohibiting the appellants from interfering with the removal of the obstructions. Gregory v. Crain, 291 Ky.

194, 163 S. W. 2d 289; 28 Am. Jur., Injunctions, Sec. 35, pp. 230, 232.

Under KRS 94.929(3) the legislative body of the City of Druid Hills has the right to determine the character of improvements to be made upon its streets. However, pending that determination, the Chancellor had the power to authorize appellee to pave the six-foot strip of the street which was obstructed. To hold otherwise would, in effect, render ineffectual the public's right to the full use of the street for the purposes and intents for which the street was dedicated. KRS 88.010.

As a further defense to this action appellants contend that appellee was guilty of laches by failing to reasonably assert its claim to the prejudice of appellants. The record supports the view that appellee has made a diligent effort to enforce its right, and that of the public, under KRS 88.010 and KRS 94.670 to compel the city to keep the street open for the purpose for which it was dedicated. We uphold the Chancellor's findings rejecting this contention.

It is finally insisted by appellants that the church property does not abut on Olympic Avenue and therefore the appellee has neither the legal right to use the avenue as a means of ingress to and egress from the church property, nor the legal right to maintain this action. Both contentions are frivolous because appellee's property does abut at the east end of the street. See, Volpenheim v. Westerfield, 216 Ky. 157, 287 S. W. 545; Alsip v. Hodge, 214 Ky. 438, 283 S. W. 392.

Judgment affirmed.

MODIFIED OPINION OF THE KENTUCKY COURT OF APPEALS.

The Broadway Baptist Church, a corporation, filed this action against the City of Druid Hills and other parties to enjoin them from interfering with the removal of guard rails and other obstructions placed upon Olympic Avenue which prevent traffic from using the street for ingress to and egress from plaintiff's property located at the dead-end of the street. The complaint also asked that the Church be permitted to pave the six-foot portion of the Olympic Avenue lying between plaintiff's property and the paved portion of the street. The Chancellor entered a judgment granting the relief sought by the plaintiff, and the defendants have appealed.

Druid Hills is a city of the sixth class. It is conceded that Olympic Avenue is a public street, dedicated to the city by a recorded instrument for that purpose, and that it extends from Cheltoweth Avenue eastwardly to the line of the church property. The avenue is wholly within the territorial limits of Druid Hills.

Appellants urge that the city has the exclusive right to determine whether it will keep Olympic Avenue open to traffic and that it also can decide the extent and character of the improvements it will permit to be made on its streets. To support its contentions, the appellants rely principally upon the provisions of two statutes:

First, KRS 88.080 which provides:

> "The board of trustees of the city may . . . do and perform any and all acts and things necessary or proper to carry out the provisions of the laws relating to cities of the sixth class, and may enact and enforce within the city limits all local, police, sanitary and other regulations not in conflict with general laws."

And secondly, KRS 94.292 (3) which provides:

> "* * *, the city legislative body shall have full power to determine what public improvements shall be made, the extent and character of the improvements, the kind of material to be used, and the necessity for the improvement, and its determination shall be final. * * *."

While it is apparent that those statutes confer upon the governing authorities of cities of the sixth class the power to reasonably regulate the use of their streets, yet such cities are required by the mandatory provisions of KRS 94.670 to keep open all public ways dedicated to the city. This statute provides:

> "The city legislative body in cities of the sixth class may cause to be removed any obstructions in the streets of the city. It shall cause to be opened any public way dedicated to the town that is closed, but before doing so shall give to the adjacent property owners one month's notice thereof."

The Chancellor correctly determined that it was the duty of the governing body of Druid Hills to open Olympic Avenue and to make it available for public use in conformity with the purpose for which it was dedicated. Morrow v. Richardson, 278 Ky. 233, 128 S. W. 2d 560; Volpenheim v. Westerfield, 216 Ky. 157, 287 S. W. 545. Since the city could have been compelled to remove the obstructions on Olympic Avenue that prevented the free use of the travelled portion of the street (KRS 94.670), we have concluded that the Chancellor did not abuse his discretion by issuing a restrictive injunction prohibiting the appellants from interfering with the removal of the obstructions. Gregory v. Crain, 291 Ky. 194, 163 S. W. 2d 289; 28 Am. Jur., Injunctions, Sec. 35, pp. 230, 232.

Under KRS 94.292 (3) the legislative body of the City of Druid Hills has the right to determine the character

of improvements to be made upon its streets. However, pending that determination, the Chancellor had the power to authorize appellee to pave the six-foot strip of the street which was obstructed. To hold otherwise would, in effect, render ineffectual the public's right to the full use of the street for the purposes and intents for which the street was dedicated. KRS 88.010.

As a further defense to this action appellants contend that appellee was guilty of laches by failing to reasonably assert its claim to the prejudice of appellants. The record supports the view that appellee has made a diligent effort to enforce its right, and that of the public, under KRS 88.010 and KRS 94.670 to compel the city to keep the street open for the purpose of which it was dedicated. We uphold the Chancellor's findings rejecting this contention.

It is finally insisted by appellants that the church property does not abut on Olympic Avenue and therefore the appellee has neither the legal right to use the avenue as a means of ingress to and egress from the church property, nor the legal right to maintain this action. Both contentions are frivolous because appellee's property does abut at the east end of the street. See, Volpenheim v. Westerfield, 216 Ky. 157, 287 S. W. 545; Alsip v. Hodge, 214 Ky. 438, 283 S. W. 392.

Judgment affirmed.

JUDGMENT OF THE KENTUCKY COURT OF APPEALS.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

It is further considered that the appellee recover of the appellants its cost herein expended.

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JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 669

CHARLES L. THOMAS, ET AL., - - Petitioners,

versus

BROADWAY BAPTIST CHURCH,
a Corporation, - - - - - - - - Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

JAMES W. STITES,
1212 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Respondent.

February 6, 1959.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States.

October Term 1958

No. 669

CHARLES L. THOMAS, ET AL., - - - *Petitioners,*

v.

BROADWAY BAPTIST CHURCH,
a Corporation, - - - - - - *Respondent.*

BRIEF OPPOSING PETITION FOR CERTIORARI.

May it please the Court:

By applying established principles of Kentucky law, the trial court, and the Court of Appeals of Kentucky, decided that the respondent, and those desiring access to respondent's property which abuts the end of a dedicated street, have the right in common with the public generally to use the street as a means of access to respondent's property. No federal question of importance was decided.

The pertinent facts giving rise to this controversy are correctly stated in the various opinions, filed as an appendix to the petition.

The city of Druid Hills (a small suburb of Louisville) was the principal defendant below. It has not joined in this petition. Neither have the individual trustees of the city (who were parties below) joined in

this petition, other than the petitioner Jefferson, who was and is a resident on Olympic Avenue. The petitioners (who call themselves "appellants") include the attorney who has filed this petition. They are simply residents along Olympic Avenue.

Both the lower court and the Court of Appeals of Kentucky held the avenue to be a public, dedicated street. The petitioners, of course, have no standing vicariously to raise constitutional questions applicable to the city alone, and the city is not here complaining.

We gather from the petition that the additional traffic on this public street, which may result from the lawful use of it by the church, is somehow deemed by the petitioners to be a violation of due process as to them. Obviously, the use of a public street by members of the public to whom it was dedicated does not deprive petitioners of any right protected by the due process clause of the Constitution. None of the five reasons relied on (Pet., pp. 10-11) presents a question arising under the due process clause.

Respectfully submitted,

JAMES W. STITES,
1212 Ky. Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Respondent.

February 6, 1959.